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No. 79-1342

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALLEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his conviction for filing a false income tax return for 1970, in violation of 26 U.S.C. 7206(1). He contends that (1) the trial court erred in holding that he had waived any objection to inclusion in the indictment of an allegedly multiplicitous lesser-included offense; (2) the trial court erred in permitting testimony relating to petitioner's prior conviction for failure to file tax returns; and (3) the trial court erred in permitting the admission into evidence of other tax-related misconduct of petitioner which had not resulted in conviction.

The pertinent facts may be summarized as follows: Petitioner was charged with attempted income tax evasion for 1970, 1971, and 1972, in violation of 26 U.S.C. 7201, and with filing false income tax returns for those same three years, in violation of 26 U.S.C. 7206(1) (Pet. App. 6a). Prior to trial, petitioner moved to dismiss the false return counts on the ground that they were multiplicitous

restatements of the first three counts of the indictment charging tax evasion (A. 2060).[1] The district court denied this motion on the authority, *inter alia*, of *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (A. 2072(52)). Petitioner did not renew this motion during the trial. When the jury was unable to reach a verdict, the district court declared mistrial (Pet. App. 10a & n.5). Thereafter, petitioner was retried, with a different judge presiding, convicted on Count 4 for filing a false tax return for the year 1970 and sentenced to a two-year term, with all but two months suspended, and a fine of $5,000 (A. 24). Prior to the retrial, the district court informed petitioner that rulings in the prior trial would not be considered binding during the retrial (Pet. App. 11a). Neither prior to nor during the retrial did petitioner move to dismiss Count 4, the false return count on which he was convicted (Pet. App. 8a).

The evidence at trial established that petitioner failed to report on his 1970 tax return substantial cash income he received from the sale of promotional records obtained by him from Capitol Records. Petitioner's failure to disclose the receipt of the record proceeds on his personal income tax return was the basis for the false filing count (A. 15-16).

1. Petitioner contends (Pet. 8-15) that the district court erred in not granting his motion, made prior to the first trial, to dismiss Count 4 of the indictment (filing a false tax return for 1970), on the ground that it was a multiplicitous lesser-included offense of Count 1 of the indictment (attempted tax evasion for 1970). But the district court and the court of appeals correctly held that petitioner had failed to raise a timely objection of

[1]"A." refers to the separately bound joint appendix filed in the court of appeals.

multiplicity and therefore waived any objection he might have had (Pet. App. 1a-2a).[2]

Petitioner acknowledges (Pet. 10-12) that he did not object to Count 4 on the ground of multiplicity either prior to or during the retrial. He does not dispute that he could have waived his claim of multiplicity, but he now contends that the first trial court's ruling denying his motion to dismiss Counts 4 through 6 of the indictment became the law of the case so that he was not required to renew this objection at the retrial in order to preserve his objection.

For present purposes, the "law of the case" doctrine provides generally that where a trial court judge renders a decision and issues an order in a case, and thereafter the case is transferred to another trial judge, the latter judge will respect and not overrule the first judge's decision and order. *Stevenson* v. *Four Winds Travel, Inc.*, 462 F. 2d 899, 904-905 (5th Cir. 1972). The doctrine, however, is not an absolute rule; rather, it is merely a rule of practice which a judge, in his discretion, may decline to follow. *Evans* v. *Calmar S.S. Co.*, 534 F. 2d 519, 521 (2d Cir. 1976); *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134-136 (2d Cir.), cert. dismissed, 352 U.S. 883 (1956).

Here, in the retrial, the trial court made it clear that he did not consider the rulings made in the first trial binding upon him (see A. 2137-2138).[3] Petitioner has not argued

[2]It is not altogether clear that Count 4 was a multiplicitous restatement, as a lesser-included offense, of Count 1 (see Pet. App. 9a-10a). Because they found that petitioner had waived any objection based on multiplicity, neither court below reached the merits of this question.

[3]It is not at all clear that the judge in the first trial intended that his ruling denying petitioner's motion to dismiss the false filing counts for multiplicity should operate as a final ruling on the claim. In opposing the motion to dismiss for multiplicity at the first trial, the government argued that the question of multiplicity was better resolved after the evidence was presented (see A. 2094-2101). The trial

that the judge in the retrial abused his discretion in refusing to be bound by the rulings made at the first trial. Indeed, he can hardly do so in light of his contention in a memorandum filed before the retrial that the law of the case doctrine was inapplicable (see A. 2103). In these circumstances, there is no basis for petitioner's claim that his failure at the retrial to renew his multiplicity objection was based upon his belief that the law of the case doctrine precluded him from renewing the objection. His failure to renew the multiplicity objection amounted to a clear waiver of that claim.

Moreover, as the court of appeals suggested (Pet. App. 2a), petitioner's conduct during the second trial would appear to have been guided by a recognition that it was beneficial to him to have the lesser-included offense of Section 7206(1) considered by the jury. See *United States* v. *Tsanas*, 572 F. 2d 340, 345 (2d Cir.), cert. denied, 435 U.S. 995 (1978). Indeed, as the district court noted (Pet. App. 9a-10a & n.4), petitioner not only failed to object to the court's submission of Count 4 to the jury, he submitted requested instructions on that count. In addition, while not renewing his multiplicity objection, petitioner did renew in the retrial many of the motions and applications which had been submitted to and ruled upon by the judge in the first trial (Pet. App. 11a). In sum, petitioner plainly made a deliberate

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judge pointed out that the first three counts of the indictment charged an evasion of tax by the filing of a false and fraudulent tax return, while the latter three counts of the indictment charged the verification, under penalties of perjury, of the tax returns which petitioner did not believe to be true. The court then denied the motion, relying upon the same cases which the government had cited in support of its claim that the question of multiplicity was better resolved after the evidence was presented at trial (see A. 2072(52), 2095-2096). It therefore appears that the judge was merely denying the motion as premature and indicating that the motion should be renewed at the close of the evidence. In the circumstances, the doctrine of the law of the case could hardly operate to preclude the judge at the retrial from considering any claim of multiplicity.

choice in the retrial not to object to the false filing counts.[4] The courts below therefore correctly concluded that he had waived any objection on the ground of multiplicity.[5]

2. Petitioner further contends (Pet. 16-20) that the district court improperly allowed the prosecutor, on cross-examination of petitioner, to adduce evidence of a prior misdemeanor conviction under 26 U.S.C. 7203 for failing to make and file quarterly returns of federal income and F.I.C.A. taxes withheld from the wages of employees. In petitioner's view, the commission of a failure to file offense does not involve "dishonesty or false statement."

It is settled, however, that crimes that involve defrauding the revenue are admissible under Fed. R. Evid. 609(a)(2) to impeach the credibility of a witness. *United States* v. *Apuzzo*, 555 F. 2d 306 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978). Accord, *United States* v. *De Angelis*, 490 F. 2d 1004 (2d Cir.), cert. denied, 416 U.S. 956 (1974). Petitioner's prior conviction for willfully failing to make and file withholding tax returns clearly

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[4]If the first trial judge had dismissed Count 4, the government would have been entitled to a lesser-included offense instruction. See Fed. R. Crim. P. 31(c); *Keeble* v. *United States*, 412 U.S. 205, 208 (1973). It is therefore difficult to understand how petitioner was harmed by the second trial judge's failure *sua sponte* to dismiss that count.

[5]Petitioner contends (Pet. 14-15) that the decision below conflicts with decisions of this Court which hold that a waiver can be found only if there has been an " 'intentional relinquishment * * * of a known right' " and that an evidentiary hearing must be held to determine whether a waiver has occurred. The decisions (*Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); and *Henry* v. *Mississippi*, 379 U.S. 443 (1965)) upon which he relies, however, do not support his claim. Each of those cases dealt with the question whether there had been a waiver of a constitutional right. There is no similar right involved here. At all events, where, as here, there was no doubt that the defendant was aware of his right to object, the court explicitly indicated that it would hear any objections, and petitioner made no objection on the ground of multiplicity, there was clearly an "intentional relinquishment * * * of a known right."

involved an attempt to defraud the revenue. In addition, the district court reviewed the specific underlying facts of the conviction and found that the crime involved dishonesty or a false statement, particularly noting that the failure to file occurred in a context in which petitioner was holding his employees' money as a fiduciary for the government (A. 1068-1072). This finding made evidence of the conviction properly admissible under Rule 609. See *United States* v. *Hayes*, 553 F. 2d 824, 827 n.5 (2d Cir.), cert. denied, 434 U.S. 867 (1977).

3. Finally, petitioner argues (Pet. 20-21) that the prosecutor, on several occasions, asked questions of witnesses that were intended to "paint petitioner as a generally 'bad' person," in violation of the prohibition in Fed. R. Evid. 404(a) against allowing evidence of other acts to show bad character or tendencies toward criminality. Contrary to petitioner's assertion, however, it was not improper for the prosecutor to question a government witness and petitioner about advances from a corporation that were not repaid (A. 908-914). The questioning of the government witness was done on redirect examination only after defense counsel had cross-examined the witness about the practices of the corporation and petitioner in regard to advances. Once petitioner had "opened the door" to this line of inquiry (see A. 910-913), the government properly completed the inquiry for the jury. See *United States* v. *Flinkelstein*, 526 F. 2d 517, 527 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976).[6]

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[6]Cross-examination of petitioner with respect to advances from ABKCO and his failure to submit vouchers for them was likewise proper, for he had testified with respect to the advances on direct examination. See *United States* v. *Benedetto*, 571 F. 2d 1246, 1250 (2d Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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